IN THE HIGH COURT OF DELHI

RSA No. 195/2004

Sh. Zile Singh ..... Appellant
! through: Mr. Harish Kumar Mehra, Advocate

VERSUS

$ Sh. Mangloo Ram Bansal ..... Respondent
^ through: Mr. Roop Chand, Advocate

% DATE OF DECISION: 15.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**(Oral)
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1. The present appeal has been filed by the appellant against the judgment dated 5.8.04 passed by the ADJ, Delhi whereby appeal filed by the appellant against the judgment and decree dated 6.5.03 passed by the Civil Judge, Delhi was dismissed.

2. Appellant was the defendant in the suit filed by the respondent seeking a decree in sum of Rs.2 lacs.

3. It was pleaded in the plaint that the plaintiff and defendant entered into an agreement to sell dated 17.9.90 whereunder defendant agreed to sell an alternative plot which was to be allotted to

him by DDA for a sale consideration of Rs.2 lakhs. That pursuant to the said agreement the plaintiff paid earnest money in sum of Rs.1 lakhs to the defendant on 17.9.90. That the balance sale consideration was to be paid at the time when the possession of the plot was to be handed over to the plaintiff and execution of sale deed and other necessary documents. That the defendant failed to perform its part of obligations under the agreement. That it was a stipulation of the agreement that in case of breach by the defendant he i.e. the defendant would be liable to pay to the plaintiff double the amount of the earnest money. Thus, the suit for recovery of Rs.2 lakhs was filed.

4. Vide judgment and decree dated 6.5.03 the learned Civil Judge has held that the defendant had breached the agreement to sell dated 17.9.90 and that the plaintiff is entitled to recover a sum of Rs.1 lakhs together with the interest @ 12% p.a. for the period from 17.9.90 (date of payment of earnest money of Rs. 1 lakhs) till the date of the decree. Plaintiff was further held entitled to future interest @ 6% p.a. from the date of decree till date of realization.

5. Against the said judgment and decree the defendant filed an appeal under Section 96 of the Code of Civil Procedure. Vide judgment dated 5.8.04, the learned Additional District Judge dismissed the appeal and affirmed the judgment and decree dated 6.5.03.

6. In these circumstances the appellant/defendant has filed

the present second appeal under Section 100 of the Code of Civil Procedure challenging the judgment dated 5.8.04.

7. In the memorandum of the appeal it was submitted by the appellant that no claim for pre-suit interest was raised by the plaintiff in the demand notice or in the plaint and in absence of any contract between the parties providing for payment of pre-suit interest the learned Trial Court was not justified in awarding pre-suit interest to the plaintiff.

8. Per Contra, it was submitted by the plaintiff/respondent that the 'interest' is an integral part of the claim and therefore he is entitled to receive interest from the date of the agreement till the date of the decree.

9. Vide order dated 21.5.07 following substantial question of law was formulated by this Court: -

> "1. Whether the plaintiff was entitled to get interest from 17th September, 1990 to 5th June 1998, that is, the date on which the suit was filed without praying the same in the demand notice or in the plaint?"

10. At the hearing today learned counsel conceded that the substantial question of law as framed is not happily worded. Counsel concedes that the substantial question of law should read as under :-

"In absence of any contract between the parties providing for payment of pre-suit interest and in light of the fact that no claim for

pre-suit interest was raised by the plaintiff in the plaint or in the demand notice, whether the learned Trial Court was justified in awarding pre-suit interest?"

11. The claim relating to payment of interest in a suit for money can be made under three heads –

I. Interest prior to the institution of the suit on the principal sum adjudged;

II. Pendente lite interest on the principal sum adjudged from the date of the suit to the date of the decree; and

III. Future interest on the principal sum adjudged from the date of the decree to the date of the payment.

12. So far as pendente lite and future interest are concerned, Section 34 of the Code of Civil Procedure is applicable. As per Section 34 of CPC, the court may order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree. So far as the future interest is concerned, the court may direct payment of interest not exceeding six per cent on the sum adjudged. The proviso to Section 34, however, makes it clear that where the liability in relation to the sum adjudged has arisen out of commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or when there is no contractual rate, the

rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

13. Interest Act, 1978, governs payment of pre-suit interest. Section 3 and 4 of the Interest Act, 1978 are relevant for the aforesaid purpose. The relevant portions of the said provisions are quoted hereunder :-

> "3. **Power of court to allow interest**.- (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, -
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> (a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
>
> (b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:
>
> Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.
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> x x x x x x
>
> (3) Nothing in this section,-
>
> (a) shall apply in relation to-
> (i) any debt or damages upon which interest is payable

as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect-

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest."

"4. **Interest payable under certain enactments**.- (1) Notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section(1),the court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed, namely:-

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract, from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action."

14. Noting the provisions of Section 3 and 4 of the Interest Act, the Madras High Court in the decision reported as *Batliboi & Co Ltd v Beama Mfg Pvt Ltd*, (2006) 1 MLJ 276 observed as under :-

> "A combined reading of the provisions contained in Sections 3 and 4 makes it clear that,
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> (1) interest is payable on a pre-suit claim, if there is any statutory enactment to that effect (provisions contained in the Negotiable Instruments Act or the Land Acquisition Act or specific instances where interest is payable under an enactment);
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> (2) interest is payable under other rule of law;
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> (3) interest is payable by virtue of any usage having the force of law;
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> (4) interest is payable as of right by virtue of any agreement as contemplated under Section 3(3)(a);
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> Keeping in view the fact that in Section 3(3) the expression "agreement" has been used in contradistinction with Section 3(1)(a), where the expression "written instrument" has been used, it is obvious that such agreement contemplated under Section 3(3)(a) can be express agreement or even implied agreement.
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> (5) interest is payable if the claim relate to a debt payable by virtue of a written instrument at a certain time;
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> (6) interest is payable from the date of any written notice given by the person entitled to such claim.
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> It is however required to be noticed that in the matters coming within Section 4 of the Interest Act, 1978, it is mandatory for the court to award Page 1560 interest,

whereas in the matters coming within the Section 3, it is discretionary for the court to consider the question of grant of interest."

15. The provisions contained in the Interest Act, 1978 are almost similar to the provisions contained in the Interest Act, 1839. While considering the question of payability of interest for the period prior to the date of filing of the suit, the Privy Council in the decision reported as *Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji and Ors.* AIR 1938 Privy Council 67 observed as under :-

> "... The crucial question however is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution of this question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, under Section 80, Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 32 of 1839, the Court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument."
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> 16. It was further observed :-
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> "...There is a considerable divergence of judicial opinion in India on the question of whether interest can be recovered as damages under Section 73, Contract Act, where it is not recoverable under the Interest Act. Now, Section 73, Contract Act, gives statutory recognition to

> the general rule that, in the event of a breach of a contract, the party who suffers by such a breach is entitled to recover from the party, breaking the contract, compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon Illus.(n) to that section. The illustration however does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specified date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment."

17. The claim of the plaintiff/respondent for pre-suit interest is to be judged keeping in view the aforesaid principles.

18. There is no dispute that in the present case there is no written instrument under which the debt is payable at a certain time. The plaintiff has also not averred in the plaint that there was any agreement with the defendants regarding payment of interest or there is any usage having the force of law regarding payment of interest. In the absence of any proof of agreement, either express or implied, or usage having the force of law regarding payability of interest, and in the absence of any written instrument, the claim of interest can be sustained only if it is proved that a written notice of demand to that

effect has been issued.

19. In the present case admittedly no written notice was ever issued claiming interest at any point of time.

20. In such view of the matter the appellant is right in contending that no interest could have been claimed much less decreed prior to the date of filing of the suit. So far as pendente lite and future interest are concerned, it is well settled that such matters are within the discretion of the Court. Therefore, the calculation of the interest @ 12% per annum during the pendency of the suit and 6% per annum after the decree which is based on the discretion of the Trial Court cannot be said to be arbitrary and in view of the judgment of the Supreme Court in the decision reported as *Mahesh Chandra Bansal v Krishna Swaroop Singhal & Anr* 1997 (III) CTC 367, I do not find any reason to interfere with such part of the decree.

21. In light of the above discussion, I hold that the learned Trial Court was not justified in awarding pre-suit interest @ 12% p.a. for the period from payment of earnest money i.e. 17.9.90 till the date of filing the suit i.e. 5.6.98. The judgment and decree dated 6.5.03 is accordingly modified holding that interest prior to 5.6.1998 is declined.

22. The appeal is accordingly allowed in terms of para 21 above.

23. No costs.

November 15, 2007 PRADEEP NANDRAJOG, J.
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